



United States Department of the Interior

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SALINAS RAMBLERS MOTORCYCLE CLUB, ET AL.

IBLA 2005-217

Decided July 10, 2007

Appeal from a decision of the Hollister Field Office, Bureau of Land Management, temporarily closing the Serpentine Area of Critical Environmental Concern to off-road vehicle use.

Affirmed.

1. Evidence: Generally--Evidence: Burden of Proof--
Evidence: Preponderance

To successfully challenge BLM's reliance on an expert, the objecting party must prove by a preponderance of the evidence that the expert's determination is arbitrary and capricious or is based on an error in methodology, data and/or analysis. Where no error in methodology, data, or analysis was alleged, and appellant disputes only the ultimate interpretation of such data, no more than a difference of opinion has been shown. Where experts disagree, BLM may rely on the reasonable opinions of its qualified experts.

2. Federal Land Policy and Management Act of 1976: Generally--
Federal Land Policy and Management Act of 1976: Rules and
Regulations

BLM's authority to manage public lands includes discretionary authority to close public lands to protect the public. Under 43 C.F.R. § 8364.1(a), BLM may issue an order to close or restrict use of designated public lands to protect persons, property, and public lands and resources. That authority is independent of the initial designation of off-road vehicle use in the land planning process. Provided BLM has satisfied the requirements in 43 C.F.R.

IBLA 2005-217

§ 8364.1(b) relating to the period and terms of the closure or restriction and publication thereof, the Board will not disturb a decision to close public lands if it finds BLM made a reasoned analysis, considering all relevant factors, that is supported by the record, and there is otherwise no compelling reason to reverse it.

3. National Environmental Policy Act of 1969: Generally

The temporary closure of an Area of Critical Environmental Concern to protect the public health and safety from exposure to increased levels of naturally occurring asbestos to complete sampling and related studies is categorically excluded from NEPA review. Under Part 516 of the Departmental Manual, Chapter 11, the temporary closure is categorically excluded as both a temporary closure of roads and as a closure for preliminary hazardous materials assessments and site investigations, site characterization studies, and environmental monitoring. BLM may choose to use an Environmental Assessment to facilitate discussion and analysis of the closure action, but where it was not required to do so under NEPA, doing so does not create an obligation under that statute where none otherwise exists.

APPEARANCES: Paul A. Turche, Esq., Boise, Idaho, for the appellants; George E. Hill, Assistant Field Manager, Hollister Field Office, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE PRICE

The Salinas Ramblers Motorcycle Club, American Motorcyclist Association District 36, California Association of 4 Wheel Drive Clubs, California Off-Road Vehicle Association, Off-Road Business Association, and the BlueRibbon Coalition have appealed from a decision of the Hollister Field Office, Bureau of Land Management (BLM), dated May 25, 2005, temporarily closing the Serpentine Area of Critical Environmental Concern (ACEC) completely to the public from June 4, 2005, to October 15, 2005, until the final risk assessment is completed.¹

¹ BLM closed the Serpentine ACEC between June 1 and Oct. 15, 2006, as well. 71 Fed. Reg. 44311 (Aug. 4, 2006).

IBLA 2005-217

Background

The ACEC is part of the Clear Creek Management Area (CCMA) in southern San Benito and western Fresno counties of California. It is an extremely popular area for such recreational activities as off-road vehicle (ORV) use, hiking, and camping. Environmental Assessment EA-CA-190-05-21 (EA) at 2. There are approximately 440 miles of roads and trails in the ACEC. *Id.* The number of visitors to the CCMA dramatically decreases during the summer because the weather is very dry and hot, creating dusty conditions. *Id.* The soil in the Serpentine ACEC contains high concentrations of naturally occurring asbestos. *Id.* During the summer when the soil is dry, recreational activities can cause the asbestos to combine with the dust in the air. BLM had attempted to control the dust in the Serpentine ACEC by using chemical dust control, but the results were unsatisfactory and cost-prohibitive. *Id.* at 3.

The Federal government has concluded that all forms of asbestos are hazardous to humans, and that all can cause cancer, although the *chrysotile* form found in the ACEC is deemed to be less harmful than those in the *amphibole* family of minerals. U.S. Department of Health and Human Services, Public Health Service, Agency for Toxic Substances and Disease Registry, *Toxicological Profile for Asbestos (update)*, Administrative Record (AR) 236, sec. 1.1. Like the Department of Health and Human Services, the U.S. Environmental Protection Agency (EPA), and the International Agency for Research on Cancer have also determined that asbestos is a carcinogen. *Id.*, sec. 1.7. Asbestos exposure can cause lung cancer, mesothelioma, asbestosis, and plural plaques. *Id.*, sec. 1.5. In February 2005, BLM received the EPA's Technical Memorandum "Human Health Risk Assessment - Asbestos Air Sampling Clear Creek Management Area, California September 15, 2004" (Technical Memorandum), which alerted BLM that the initial analysis of air sampling in the ACEC indicated a significant increase in the levels of airborne asbestos fibers. The sampling had been conducted as part of a pilot effort to "reality test the asbestos . . . analysis methods" that would be used in a later, larger scale test in the CCMA. Technical Memorandum at 2, AR 107. Air samples were collected from the personal breathing zones of participants traveling on motorcycles in a group for 23 - 25 miles of unpaved road. The samples taken from the inhalation exposures of the lead and first and second trailing motorcyclists showed levels of asbestos fibers that were within or above the risk management range generally used by the EPA to determine whether exposures may exceed potential lifetime cancer risks. *Id.* at 1, 6. The Technical Memorandum concluded that further sampling was needed and that risk mitigation might be necessary. *Id.* at 6.

As a result of its study, the EPA recommended that BLM close the ACEC from Memorial Day through mid-November to prevent visitor exposure to the increased

IBLA 2005-217

levels of asbestos. Response to Statement of Reasons (Answer) at 3. While considering EPA's recommendation, in May 2005 BLM prepared the EA to analyze the proposal to close the ACEC, held a conference call with some of appellants' representatives on May 5, 2005, met with those representatives on May 12, 2005, and held a public workshop regarding the danger and need for a closure on May 17, 2005. *Id.* The EA, Finding of No Significant Impact (FONSI), Decision Record, and closure order were issued together on May 25, 2005. BLM published notice of the closure in the Federal Register. 70 Fed. Reg. 43703 (July 28, 2005). The EA acknowledges that "[u]se restrictions may be necessary for appropriate interim management of the CCMA while EPA completes its studies." EA at 4. Appellants timely appealed on June 28, 2005.²

Arguments of the Parties

Appellants argue the decision to close the ACEC should be reversed because it was arbitrary and capricious. Consistent with their expert's findings, appellants argue that the type of asbestos found in the ACEC is not dangerous, and that BLM therefore had no rational justification for closing the area. Supplemental Statement of Reasons (SSOR) at 2-3. Moreover, appellants argue that BLM illegally excluded the public from the decisionmaking process in violation of section 102 of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332 (2000). SOR at 10. Finally, appellants argue this closure will affect the current proposed CCMA Resource Management Plan (RMP) amendment to designate future recreation routes in violation of Council on Environmental Quality regulation 40 C.F.R. § 1506.1(a) in that NEPA prohibits any action that would have an adverse environmental impact or limit the choice of reasonable alternatives. SOR at 11.³

² Appellants also petitioned to stay the decision, but later withdrew the request.

³ We note also that appellants argued that BLM illegally implemented the closure before publishing or serving the decision in violation of 43 C.F.R. §§ 4.21(a)(1) and 4.411(a). SOR at 8. In accordance with the requirements of 43 C.F.R. § 8364.1(b) the closure notice adequately set forth the details and reasons for the closure and was published at 70 Fed. Reg. 43703 on July 28, 2005.

As to the alleged lack of service, BLM provided a copy of the administrative record and did not provide any green cards showing service on appellants. Nonetheless, the record confirms that they received copies of the EA and the closure order. Answer at 3, 4; Response to Petition for Stay at 1; June 10, 2005, Letter from State Director Mike Pool to Paul A. Turcke, Esq., AR 1. Appellants timely appealed on June 28, 2005, and thus they have not been prejudiced by any such defect in service.

Appellants are correct that the decision should not have been effective during the 30-day appeal period, but there is no effective relief the Board can give at this time.

(continued...)

IBLA 2005-217

From its response, it is clear that BLM asserts that the closure was reasonable and considered all of the relevant factors. BLM insists that the closure was necessary for the protection of the public because asbestos is a dangerous substance. Answer at 1. As support, BLM relies on the EPA's expert knowledge regarding the potential effects of asbestos. BLM stresses the closure was permitted by 43 C.F.R. § 8364.1, which does not require BLM to complete the normal NEPA procedure, including receiving public comments. Answer at 3-4. BLM argues that it nonetheless voluntarily met with the public and prepared an EA for the action. *Id.* at 3. Apparently responding to appellants' argument that the closure violates 40 C.F.R. § 1506.1(a), BLM acknowledges that while the amendment and the closure both relate to the land within the CCMA, the 2004 RMP amendment is designed to designate a network of ORV routes, but the closure relates to human health risks associated with asbestos. *Id.* at 2. Therefore, BLM argues, the closure "has no bearing on the outcome of the planning process." *Id.*; see also June 10, 2005, Letter from State Director Mike Pool to Paul A. Turcke, Esq., AR 1.

Analysis

This appeal raises two issues: Whether BLM had adequate reason and authority to temporarily close the ACEC to the public, and whether it was required to engage in NEPA analysis before doing so.

[1] We begin with the reasons for ordering the closure. At the outset, we acknowledge that BLM is entitled to rely on the professional opinion of its technical experts, concerning matters within the realm of their expertise, where it is reasonable and supported by record evidence. *Fred E. Payne*, 159 IBLA 69, 77 (2003). Manifestly, those experts may be selected from within BLM's own ranks or from elsewhere, whether from within the Federal government or without. To successfully challenge BLM's reliance on an expert, the objecting party must prove by a preponderance of the evidence that the expert's determination is arbitrary and capricious or is based on an error in methodology, data and/or analysis. *Fred E. Payne*, 159 IBLA at 77-78 (citing *Southern Utah Wilderness Alliance*, 158 IBLA 212, 216 (2003); *West Cow Creek Permittees v. BLM*, 142 IBLA 224, 238 (1998); *Yankee Gulch Joint Venture v. BLM*, 113 IBLA 106, 129 (1990); *Western American Exploration Co.*, 112 IBLA 317, 318-19 (1990); and *America Gilsonite Co.*, 111 IBLA 1, 31-33, 96 I.D. 408, 424-25 (1989); *Bruno D'Agostino*, 106 IBLA 155, 158 (1988). A difference of opinion will not suffice. *Susan J. Doyle*, 138 IBLA 324, 327 (1997). In cases where experts disagree, "an agency must have discretion to rely on the

³ (...continued)

It should be noted, however, that under 43 C.F.R. § 4.21(a)(1), the Board could have provided that the decision was effective immediately. Had BLM moved the Board to do so, we would not have hesitated to grant it on the facts of this record.

IBLA 2005-217

reasonable opinions of its qualified experts.” *Fred E. Payne*, 159 IBLA at 78, and cases cited.

Here, BLM chose to rely on EPA as its expert on the subject of airborne asbestos, which is considered the lead agency with respect to public health and safety relative to asbestos. Answer at 3. That agency therefore was in charge of sampling the air in the ACEC for BLM, and the resulting studies “indicate a higher risk to people from exposure to airborne asbestos in CCMA than EPA and BLM had previously thought.” EA at 4. Indeed, initial sampling indicated that ORV use during the dry season exacerbated the danger of asbestos exposure in the Serpentine ACEC. Accordingly, sampling was to continue to determine the degree of risk, the results of which were to be reported by the EPA in July 2006. *Id.*

Appellants do not challenge either the sampling methods or EPA’s conclusion that ORV use in the Serpentine ACEC during the dry season increases exposure to asbestos; instead, they dispute the conclusion that the *Coalinga chrysotile* asbestos found in the ACEC constitutes a dangerous form of asbestos. Appellants’ expert, Dr. E.B. Ilgren, has submitted his declaration in which he asserts that the type of asbestos found in the ACEC, *Coalinga chrysotile*, is not dangerous to humans under virtually any circumstance. Ilgren Declaration at 12-13; SSOR at 2. According to Ilgren, the physical characteristics of *Coalinga chrysotile* fibers prevent it from being inhaled into the lungs; the few that do enter the body fall apart and are rapidly cleared or digested. *Id.* at 12-13. He therefore avers that *Coalinga chrysotile* fibers “do not portend any risk at all.” *Id.* at 14. Appellants thus reason that (1) since *Coalinga chrysotile* is harmless, an increase in the concentration of those fibers in the air is equally harmless; and (2) since the *Coalinga chrysotile* has no effect on the public health, BLM had no rational basis for closing the area, and thus its action was arbitrary and capricious.

BLM acknowledges that there are disagreements in the scientific field regarding the health risks of naturally occurring asbestos, but notes that Ilgren’s opinion is contrary to the findings of the EPA, the Occupational Health and Safety Administration, the Department of Health and Human Services, and the Agency for Toxic Substances and Disease Registry. Answer at 1, 3. Board precedent clearly supports BLM’s determination to rely upon EPA’s findings and the findings of others who do not agree with Ilgren’s view. *See, e.g., Southern Utah Wilderness Alliance*, 158 IBLA 212, 216. More fundamentally, however, in arguing that BLM should rely on Ilgren’s conclusions and reject the expert views of EPA, which are shared by other Federal agencies whose missions relate directly and substantially to the public health and safety, appellants plainly miss the point of the closure, which is to avoid further or elevated risk to visitors while more data is collected to better identify and quantify the risk to human health that may be posed by airborne asbestos. To the extent that appellants argue that Ilgren’s opinion to the contrary is the correct and only opinion,

IBLA 2005-217

that ultimate conclusion is arguably premature, and certainly no basis for terminating further sampling and study of conditions in the ACEC. And while appellants' members may be willing to assume the risk of exposure to increased levels of this form of asbestos, we perceive no error in a decision that determines to protect the health and safety of the larger public while further sampling and studies are performed. Appellants plainly espouse a different viewpoint regarding the effects of exposure to *Coalinga chrysotile* fibers, but they have not shown that the decision to temporarily close the ACEC while further investigative work proceeds is irrational or unsupported by the record before us. To the contrary, no error is shown by BLM's reliance on EPA's expertise in deciding to go forward with the assessment of the risks to human health posed by asbestos in the ACEC.

[2] We next turn to the question of whether BLM properly closed the ACEC. BLM's authority to manage public lands includes discretionary authority to close public lands to protect the public. *Daniel T. Cooper*, 154 IBLA 81, 84 (2000); *Larry Griffin*, 126 IBLA 304, 306 (1993). The closure order in this case was issued pursuant to 43 C.F.R. § 8364.1, paragraph (a) of which provides: "To protect persons, property, and public lands and resources, the authorized officer may issue an order to close or restrict use of designated public lands." The authority conferred by 43 C.F.R. § 8364.1(a) is independent of the initial ORV designation in the land use planning process. *Utah Shared Access Alliance v. Carpenter*, 463 F.3d 1125, 1130 (10th Cir. 2006), *cert. denied*, 2007 U.S. LEXIS 4364 (Apr. 23, 2007); *see also Sierra Club v. Clark*, 756 F.2d 686, 690 (9th Cir. 1985).⁴ BLM is therefore correct that the decision to close the ACEC has no implications for the RMP amendment now underway. Provided BLM has satisfied the requirements in 43 C.F.R. § 8364.1(b) relating to the period and terms of the closure or restriction and publication thereof, the Board will not disturb a decision to close public lands if it finds BLM made a reasoned analysis, considering all relevant factors, that is supported by the record, and there is otherwise no compelling reason to reverse it. *Daniel T. Cooper*, 154 IBLA 85. In this case, BLM met all the requirements set forth in the regulation. Having concluded that the record clearly shows a reasoned analysis of relevant factors, we find that BLM properly invoked its discretionary authority under 43 C.F.R. § 8364.1(a) to temporarily close the ACEC to protect the public health.

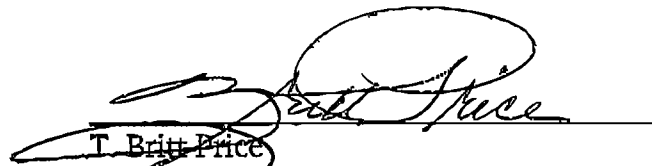
[3] What remains is appellants' NEPA argument, and the underlying assumption that the decision to temporarily close the ACEC to public use in the circumstances presented was subject to NEPA. While BLM chose to use an EA to facilitate discussion and analysis of the closure action, it was not required to do so,

⁴ We note also that the Tenth Circuit expressly rejected the assertions that closure or restriction constitutes a de facto amendment of the RMP, and that BLM must first declare an emergency before BLM can impose ORV restrictions on public land. *Utah Shared Access Alliance*, 463 F.3d at 1135-36.

IBLA 2005-217

Management programs and activities, two of which apply to the temporary closure in this case: temporary closure of roads, and "preliminary hazardous materials assessments and site investigations, site characterization studies and environmental monitoring." 516 DM 11.5G(3), 11.5H(3).⁵ The decision to use NEPA's analytical process does not create an obligation under that statute where none otherwise exists.⁶ Accordingly, appellants' allegation that the closure violated 40 C.F.R. § 1506.1(a) is without merit.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.



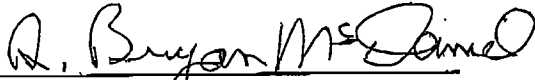
T. Britt Price
Administrative Judge

⁵ In its Answer, BLM also cited the decision in *Douglas County v. Babbitt*, 48 F.3d 1495, 1505 (9th Cir. 1995), as support for its decision. In that case, plaintiffs contended that the Department was required to comply with NEPA before designating critical habitat under the Endangered Species Act, 16 U.S.C. § 1533(a)(3) (2000). The Court noted that "NEPA was not intended to repeal by implication any other statute." 48 F.3d at 1502, citing *Merrell v. Thomas*, 807 F.2d 776, 779 (9th Cir. 1986), cert. denied, 484 U.S. 848, 108 S.Ct. 145 (1987) (quoting *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 694, 93 S.Ct. 2405, 2419 (1973)). It accordingly held that "NEPA procedures do not apply to federal actions that do nothing to alter the natural physical environment." 48 F.3d at 1505.

⁶ The EA considered six alternatives, and a no action alternative. EA at 4-5. BLM met with members of the public three times before issuing the closure decision, and in fact discussed some of those alternatives with them. Had it been necessary, we would have concluded that BLM has taken a hard look at the proposed action, identified relevant areas of environmental concern, and made a convincing case that the environmental impacts of the closure were insignificant. See *National Wildlife Federation*, 170 IBLA 240, 244 (2006), and cases cited.

IBLA 2005-217

I concur:



R. Bryan McDaniel
R. Bryan McDaniel
Administrative Judge